Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 79-612

CLAYTON RUNCK, JR.

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Robert Vogel
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Grand Forks, ND 58201

ATTORNEY FOR PETITIONER

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Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on the 19th day of July, 1979, as amended on the 30th day of July, 1979.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It reversed the denial of the District Court of a motion to amend a sentence under Rule 35, Federal Rules of Criminal Procedure, but ordered that the case be remanded to the District Court for resentencing in accordance with the original plea agreement ("specific performance").

The opinion was issued only after a prior opinion, which granted the respondent the relief he sought (an opportunity to withdraw his plea because of

failure of the trial court to either accept or reject the plea agreement as required by Rule 11(e)(3) and (4) was withdrawn after the United States petitioned for rehearing. The opinion was withdrawn without an opportunity to the petitioner Runck to respond to the petition for rehearing.

The first opinion was dated May 16, 1979; the second opinion July 19, 1979. The latter was further amended by order of July 30, 1979, striking one sentence. Petitioner Runck petitioned for rehearing, which was denied August 21, 1979.

JURISDICTION

Jurisdiction is granted under 28 U.S.C. 1254(1).

An amendment to the final opinion of the Court of Appeals was filed July 30, 1979, and petitioner's petition for rehearing was denied August 21, 1979.

QUESTION PRESENTED

Did the Court below err in ordering the District Court to resentence in accordance with a plea agreement, which the District Court had never accepted pursuant to Rule 11(e)(3) or rejected pursuant to Rule 11(e)(4), rather than remanding for the sole purpose of allowing the defendant-petitioner to withdraw his plea, the latter being the remedy he sought and the only remedy permitted by Rule 11(e)(3) and (4)?

CRIMINAL RULE PROVISIONS INVOLVED

Federal Rules of Criminal Procedure, Rule 11(e)(3):

"(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement."

Federal Rules of Criminal Procedure, Rule 11 (e)(4):

"Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea argument."

STATEMENT OF THE CASE

Petitioner pleaded guilty, after plea negotiations, to two counts of mail fraud. The plea negotiations were disclosed to the Court, which never

specifically accepted or rejected them. The District Court imposed a sentence which contained a provision for substantial restitution (about $80,000 according to the transcript) which was no part of the plea agreement. Defendant-petitioner moved the District Court under Rule 35, Federal Rules of Criminal Procedure, to amend the sentence; the District Court denied the motion, and the defendant-petitioner appealed. The Court of Appeals held that the addition of the provision as to restitution was a "material change in the plea bargain" (p. 4, line 12, slip opinion), and that it was "a breach of the plea agreement" (p. 5). In the first and second opinions, the Court said: "Thus, Runck must be given an opportunity to withdraw his plea", but this language was stricken by the amendment of July 30.

REASONS FOR GRANTING THE WRIT

I

This is a case of first impression, involving a matter of great concern to bench, bar and public--plea negotiations and plea agreements. The District Court violated Rules 11(e)(3) and (4) -- the heart of the plea negotiation process-by failing to either accept the plea agreement and impose sentence within its terms (Rule 11(e)(3)) or reject the plea agreement and allow the defendant to withdraw his plea (Rule 11 (e)(4)). The Court of Appeals very properly found that the imposition of substantial restitution as a condition of probation was a rejection of the plea bargain, which included no provision for restitution. The Court of Appeals then should have ordered the District Court to do what the rule requires when the

plea agreement is rejected, namely, allow the defendant to withdraw his plea. (In fact, the first opinion of the Court of Appeals did just this). If that had been done, the defendant would have withdrawn the plea and gone to trial or negotiated a new plea of guilty or possibly pleaded guilty without plea negotiations. But the decision is his, and his alone, to make when a plea agreement is rejected by the court, by the plain language of Rule 11(e)(4). The Court of Appeals, by sending the case back for "specific performance" has taken from him his right to decide and has given it to the District Court. It has violated the plain mandate of Rule 11(e)(4), that the court allow the opportunity to withdraw the plea if it rejects a plea bargain.

II

The Court of Appeals errs when it

says that "no unfairness to the defendant will result from providing him with satisfaction of the bargain he attempted" (p. 5, slip opinion). The fact is that the defendant-appellant has spent more than 9 months in Leavenworth Prison on a sentence which the Court of Appeals has held to be a breach of his plea bargain (p. 5, slip opinion). It is a sentence he would not have agreed to. He would not have pleaded guilty. The sentence is therefore illegal because it was not voluntary. It violated Rule 11(d) and all of the constitutional law as to voluntariness of pleas.

III

The Court of Appeals cites no case law in support of its opinion, except Santobello v. New York, 404 U.S. 257, 262-3. Santobello is inapropos, for at least two reasons: (1) It antedates the

adoption of Rule 11(e) and is therefore, to the extent it is inconsistent, modified by Rule 11(e); and (2) Santobello involves prosecutorial misconduct and the present case involves judicial misconduct. Where prosecutors mislead the court, the remedy may well be specific performance if the defendant asks for it; when the court itself violates the Rule, the remedy provided by the Rule--withdrawal of the plea--should be ordered, if that is what the defendant asks for and the Rule requires.

IV

The authorities cited by the government in its petition for rehearing to the Court of Appeals do not support the action taken. The heart of the petition is this language from p. 5 of the Petition:

". . . Rather, where relief short of ordering withdrawal of the plea will afford the defendant the benefit of its bargain, the courts either direct specific performance[1], or leave the determination of the appropriate remedy to the trial court.[2]"

"[1]See, e.g., United States v. Bowler, 585 F.2d 851, 856 (7th Cir. 1978); United States v. Shanahan, 574 F.2d 1228, 1231 (5th Cir. 1978); Petition of Geisser, 554 F.2d 698, 706 (5th Cir. 1977); United States v. Brown, 500 F.2d 375, 378 (4th Cir. 1974).

[2]See, e.g , United States v. Thomas, 580 F.2d 1036, 1038-1039 (10th Cir. 1978); Palermo v. Warden, 545 F.2d 286, 296-297 (2d Cir. 1976); cert. denied, 421 U.S. 911 (1977); Selikoff v. Commissioner of Corrections, 524 F.2d 650, 654 (2d Cir. 1975); Mosher v. LaValle, 491 F.2d 1346, 1348 (2d Cir. 1974); Johnson v. Beto, 466 F.2d 478, 479 (5th Cir. 1972); Culbreath v. Rundle, 466 F.2d 730, 735 (3rd Cir. 1976); Cf., McAleney v. United States, 539 F.2d 282, 286-287 (1st Cir. 1976)."

Of the 4 cases cited to support an option of ordering specific performance, all four involved what the courts described as "prosecution misconduct" (Geisser and Brown), "prosecutor violation" (Bowler) pr "government misconduct" (Shanahan). Not one involves a judicial violation of Rule 11(e). They are all cases where government attorneys failed to keep their promises. Furthermore, in most (probably all, although the opinions are not specific, except in the case of Brown) the defendant did not ask to withdraw his plea. Of course, if the defendant asks for specific performance, it would not be error to give it to him. But in the case now being discussed, defendant Runck has always and only asked to withdraw his plea ever since appellate proceedings began.

None of the six cases cited in favor of permitting the trial judge to fashion a remedy is in point either. In Thomas, both the prosecutor and the judge promised that all charges would be filed before sentence, and did not keep the promises. The appellate court sent the case back for the promise to be kept. In Palermo the defendant was ordered released after he had served more time than the plea negotiations led him to believe he would receive. In Selikoff a judge refused to accept a plea bargain, as he had a right to do, and gave the defendant the right to withdraw his plea, which the defendant did not do. Of course, the appellate court held this was proper, (it is what we ask for in this case). In Mosher, the defense lawyer misled his own client and it was held that the trial court should have granted

a motion to withdraw the plea before sentence, and not having done so should allow it afterward or permit specific performance. Johnson and most of the other cases cited, involve state court action, and therefore do not relate to Federal Rule 11 at all.

Culbreath is similar to Mosher. So is McAleney, except that the court held that the defendant must be allowed to withdraw his plea unless the government promised to keep its violated promise as to recommended sentence. Thus, none of the cases involves a judicial violation of Rule 11, unprovoked by government misconduct, and none of them (so far as the opinions show) involves a case where the defendant asked only to withdraw his plea of guilty, and did not seek specific performance of the plea bargain.

Thus, there are no precedents for what the Court of Appeals did in the present case. It is unauthorized by statute or case law, and violates the Criminal Rules of this Court.

V

This court has recognized many times, from Santobello, supra, onward, that plea negotiations are proper and to be encouraged. This conclusion is obviously not shared by some courts, including the Eighth Circuit (see Chief Judge Gibson's opening sentence in the opinion in this case, referring to "philosophical questions one might have about the effect of plea bargaining on the administration of criminal justice . . ." and the revision of the first opinion in this case upon the government's motion for rehearing without allowing a responsive brief, in the face of Rule 40, Federal Rules of Appellate Procedure, which says that such

petitions "will ordinarily not be granted in the absence of" (a request for an answering brief).

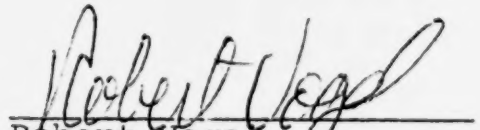
The real danger for the administration of justice which will arise if the decision of the Eighth Circuit is allowed to stand, is that trial judges, some of whom also do not like plea negotiations, will feel free to violate plea arguments, whether by adding unnegotiated items to the sentence or otherwise. If they do, the defendants, faced with sentences they did not agree to, will be put to the trouble and expense, as Clayton Runck was, of appealing to the Court of Appeals for relief. And if judges can ignore the language of Rule 11 that requires them to allow withdrawal of the plea if they reject the agreement and if they are permitted to give "specific performance" instead, such judges will succeed in

emasculating a beneficial and long needed Rule 11.

CONCLUSION

For the reasons stated, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,



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PETITION FOR WRIT OF CERTIORARI TO

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NORTH DAKOTA)
) ss
COUNTY of GRAND FORKS)

Roberta Anderson, being duly sworn on oath deposes and says that she is a citizen of the United States over the age of twenty-one years, and not a party to the above entitled matter;

That on the 15th day of September, 1979, this affiant deposited in the mailing department of the United States Postoffice at Grand Forks, North Dakota, three true and correct copies of the following document filed in the above captioned action:

1. Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

That the copies of the above document were securely enclosed in an envelope with postage duly pre-paid, and addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

To the best of your affiant's knowledge, information and belief, such address as given above was the actual postoffice address of the party intended to be so served.

Roberta Anderson
Roberta Anderson

Subscribed and sworn to before me this 14th day of September, 1979.

Elizabeth S. Morley
Elizabeth S. Morley
Notary Public
Grand Forks County, ND
My commission expires
10/9/80

ELIZABETH S. MORLEY
Notary Public, Grand Forks County, N.D.
My Commission Expires Oct. 9, 1980